United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit

77 6126

To be argued by
MICHAEL H. DOLINGER

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6126

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IRA G. JAFFESS,

Plaintiff-Appellant,

-v-

L. J. SCHAFFNER, Director,
Health Records Division,
Bureau of Medicine & Surgery,
Department of the Navy, and
SECRETARY OF THE NAVY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

BRIEF OF DEFENDANTS-APPELLEES

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L. J. SCHAFFNER, Director,
Health Records Division,
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SECRETARY OF THE NAVY,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

Statement of The Case

Plaintiff-Appellant Ira G. Jaffess appeals from an order of the United States District Court, Whitman Knapp, J., denying his motion for summary judgment and dismissing as moot his Complaint under the Freedom of Information Act and the Privacy Act. 5 U.S.C. §§ 552 and 552a.

Plaintiff had commenced this pro se action on April 25, 1977 based upon the alleged refusal of the Department of the Navy to grant his request for a copy of a letter contained in the clinical record relating to his psychiatric hospitalization at a United States Naval Hospital in 1943. In addition to release of the letter,* appellant sought damages of $100,000 from the two named defendants, the Secretary of the Navy and the Director of the Health Records Division of the Navy's Bureau of Medicine and Surgery.**

Statement of Facts

When plaintiff originally requested release of the letter in question from his psychiatric file, the Department of the Navy informed him that it would provide a copy of the letter to any physician designated by him,*** a procedure authorized by the applicable Navy regulation, SECNAVINST

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* Although the complaint does not specifically request the Court to order release of the letter, such a request is implicit in any suit brought under the Freedom of Information Act. See 5 U.S.C. § 552(a)(4)(b).

** Complaint at First and Fifth Statements.

The Clerk of the Court accepted an unpaginated collation of documents submitted by plaintiff-appellant as the Joint Appendix on this appeal. Consequently references to the relevant documents in this brief will not cite to pages of the Appendix.

*** See letter dated April 22, 1977 from Commander E.E. Roviaro to plaintiff, attached to the Complaint.

5211.5A at §6a(5)(e). That regulation provides that a medical record requested under the Privacy Act

> "shall be made available to the individual to whom it pertains unless, in the judgment of a physician, access to such record could have an adverse effect upon the individual's physical or mental health."

In such a case, the regulation states, "the individual may be asked to name a physician to whom the information shall then be transmitted."

In this instance the Navy decided to require plaintiff to designate a physician, based upon a review and evaluation of the letter by the psychiatric consultant to the Bureau of Medicine and Surgery. Plaintiff, however, declined to comply with this procedure and commenced this suit instead.*

Following the filing of defendants' Answer, appellant moved on June 4, 1977 for summary judgment, asserting, inter alia, that he was entitled to the requested document under the Privacy and Freedom of Information Acts, and that the Navy's requirement that he designate a physician to receive the letter violated his "Constitutional right of Association with members of the medical profession as he himself deems fit."**

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* Defendants have not challenged plaintiff's allegation that he exhausted his administrative remedies prior to filing suit.

** See Plaintiff's Motion for Summary Judgment.

Upon receipt of the Complaint, the Navy directed its psychiatric consultant once again to review the letter in question, and this he time concluded that plaintiff's mental health would not be adversely affected by reading its contents. The Bureau of Medicine and Surgery thereupon transmitted a copy of the letter to the Assistant United States Attorney in charge of this case, who in turn provided the document to the plaintiff on June 13, 1977. In so doing, counsel stated in his covering letter:

> "The decision to release the letter was based upon a change in the opinion of a Navy psychiatrist. However, the Navy retains the right under the Privacy Act to condition the release of medical records in appropriate cases on the designation by the requestor of a physician to receive such records."

After releasing the document to plaintiff, defendants requested dismissal of the Complaint on the grounds that the procedure originally followed by the Navy was proper under the Privacy Act and that plaintiff's claim for the letter had been mooted.

By a Memorandum and Order dated July 20, 1977, Judge Knapp denied plaintiff's summary judgment motion and dismissed the Complaint as moot. With respect to plaintiff's claim for damages, the Court noted that although the Privacy Act permits the "award of actual damages for the intentional

and willful failure of an agency to comply with an appropriate request for documents, the plaintiff had not alleged and could not establish any actual damages and in any event plaintiff had alleged no facts to suggest that the Navy had acted in bad faith in relying upon its regulation, even though its psychiatrist had subsequently changed his position with respect to release of the letter.

This appeal followed the decision of the District Court. Jurisdiction is founded upon 28 U.S.C. §1291.

Issue Presented

Did the District Court properly dismiss plaintiff's claim for damages under the Privacy Act and Freedom of Information Act when the Department of the Navy, after first conditioning release of a requested medical document on plaintiff's designation of a physician to receive it, subsequently provided the document directly to the plaintiff?

Statutes and Regulation Involved

Privacy Act, 5 U.S.C. §552a

> (d) Access to records--Each agency that maintains a system of records shall--
>
> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany

him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

* * *

(f) Agency rules--In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall--

* * *

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedures, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

* * *

(g)(1) Civil remedies.--Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provision of this subsection.

* * *

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(b) the costs of the action together with reasonable attorney fees as determined by the court.

Freedom of Information Act, 5 U.S.C. §552(a)

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(b) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

SECNAVINST 5211.5A, §6(a)(5)(e) (Oct. 8, 1976)

Subject to the provisions of this paragraph, a medical record shall be made available to the individual to whom it pertains unless, in the judgment of a physician, access to such record could

have an adverse effect upon the individual's physical or mental health. When it has been determined that granting access to medical information could have an adverse affect upon the individual to whom it pertains, the individual may be asked to name a physician to whom the information shall then be transmitted. This shall not be deemed a denial of a request for access.

Argument

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT SINCE PLAINTIFF HAD RECEIVED THE REQUESTED LETTER AND WAS NOT ENTITLED TO DAMAGES

Plaintiff's request to the Department of the Navy for the production of a letter from his psychiatric file triggered the provisions of the Privacy Act ("the Act"), 5 U.S.C. §552a (d)(1), which requires in relevant part that

> "Each agency that maintains a system of records shall--
> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him ... to review the record and have a copy made of all or any portion thereof in a form comprehensible to him..."

Should an agency refuse to comply with a request under Section (d)(1) of the Act, the requester may bring suit in the United States District Court, 5 U.S.C. §552a(g)(1)(B), which is empowered to "enjoin the agency from withholding the records and order the production to the complainant of

any agency records improperly withheld from him." 5 U.S.C. § 552a(g)(3)(A).*

Insofar as plaintiff, by suing under the Act, sought invocation of the District Court's authority to require the Navy to produce the requested letter, that claim was mooted when the Navy supplied the letter. See, e.g., Kaye v. Burns, 411 F.Supp 897 (S.D.N.Y. 1976); Burke v. Dep't of Justice, 432 F.Supp. 251, 252 (D. Kans. 1976).

Plaintiff also sought damages against the defendants based upon their failure to comply with his original request, and it is apparently from the refusal of the District Court to award such damages that he now appeals. A review of the Act and pertinent regulation, however, readily demonstrates that plaintiff cannot recover damages on the allegations of his Complaint and that consequently this aspect of his case was also properly dismissed by the District Court.

It is axiomatic that suit cannot be brought against the United States unless it has consented to be sued and

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* The Freedom of Information Act, which plaintiff also invoked in his Complaint, has similar provisions relating to the production of agency records. See 5 U.S.C. §§ 552(a)(3), 552(a)(4)(b).

that such consent must be specifically set forth by statute.* See, e.g., United States v. Testan, 424 U.S. 392, 399 (1976); Brown v. GSA, 507 F.2d 1300, 1307 (2d Cir. 1974), aff'd, 425 U.S. 820 (1976). In this case, the pertinent statutory provisions clearly demonstrate that plaintiff cannot be awarded damages.

The Freedom of Information Act makes no provision whatever for the award of damages to a complainant. The Privacy Act contains a very limited damage provision, 5 U.S.C. §552a(g)(4), which states:

> "In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recover receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court."

This provision is manifestly inapplicable to plaintiff's case for several reasons.

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* Although plaintiff named two individual as defendants, his suit is brought under the Privacy and Freedom of Information Acts and thus the only proper party is the government agency in possession of the requested document. See, e.g., Morpurgo v. Board of Higher Education, 423 F.Supp. 704, 714 n.26 (S.D.N.Y. 1976).

First, by its own terms section (g)(4) does not cover lawsuits brought to obtain access to documents. Such suits are authorized by section (g)(1)(B) of the Act, whereas damages may be recovered only in actions brought under sections (g)(1) (C) or (D), which relate respectively to the failure to maintain accurate and complete records, resulting in a "determination adverse to the individual", and to the failure to comply with other provisions of the Act or regulations when such failure results in "an adverse effect on an individual..."

Second, the Act authorizes the award of damges only if the agency has wrongfully withheld documents in an "intentional or willful" manner. But the Navy's decision in this case to condition release of the letter upon plaintiff's designation of a physician was entirely proper under the Act and Navy regulation, and consequently cannot serve as the predicate for awarding damages. The form of access initially required by the Navy is specifically authorized by section 6a(5)(e) of SECNAVINST 5211.5A in cases in which a physician determines that "access to such record could have an adverse effect upon the individual's physical or mental health." That regulation itself finds its justification in the language of section (f)(3) of the Act, which mandates in pertinent part that:

> "... each agency that maintains a system of records shall promulgate rules ... which shall

* * *

> (3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedures, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him."
> 5 U.S.C. §552a(f)(3) (emphasis added).

That this statutory provision was intended to authorize precisely the procedure adopted by the Navy is evident from the legislative history of the Act. In explaining this section of the Act, the House committee stated:

> "If in the judgment of the agency, the transmission of medical information directly to a requesting individual could have an adverse effect upon such individual, the rules which the agency promulgates should provide means whereby an individual who would be adversely affected by receipt of such data may be apprised of it in a manner which would not cause such adverse effects. An example of a rule serving such purpose would be transmission to a doctor named by the requesting individual." Rep. 93-1416, at 16-17, 93d Cong., 2d Sess. (1974).

Thus the Navy clearly was authorized to require plaintiff to designate a physician to receive the letter that he had requested, and the fact that it subsequently exercised its discretion to provide the letter directly to him cannot provide the basis for an award of damages.*

The only argument advanced by plaintiff in answer to the undeniable authority of the Navy to invoke its regulations under the Privacy Act is that the condition imposed violated his constitutional rights of privacy and association.

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* The only other provisions in either the Privacy Act or the Freedom of Information Act under which a requester can obtain some form of compensation are the virtually identically worded 5 U.S.C. § 552a(g)(3)(A) and 5 U.S.C. § 552(a)(4)(E), which provid

> "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in cases under this section [or "paragraph"] in which the complainant has substantially prevailed."

In this case plaintiff did not seek such fees or costs and in any event was not entitled to them since the Department of the Navy had a reasonable basis for its initial insistence upon plaintiff's designation of a physician and subsequently provided the letter directly to the plaintiff solely as an exercise of its own discretionary authority, based upon a change of opinion by a Navy psychiatrist. See, e.g., Kaye v. Burns 411 F.Supp. 897 (S.D.N.Y. 1976). See generally Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 512-13 (2d Cir. 1976). H. Rep. 93-876, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Admin. News 6267, 6288.

But a constitutional challenge to the Privacy Act can scarcely aid plaintiff's claim for damages since the only authority for an award to a complainant is the Act itself. In any event, his argument cannot withstand even superficial scrutiny.

Plaintiff has no constitutional right of access to government records, see e.g., Central South Carolina Chapter, Society of Professional Journalists v. Martin, 431 F.Supp. 1182 (D.S.C. 1977), including those relating to him. Cf. Fronczak v. Warden, El Reno Reformatory, 431 F.Supp. 981, 983 (W.D. Okl. 1976), aff'd, 553 F.2d 1219 (10th Cir. 1977). Thus such right of access as he may have is defined solely by statute, and it is the Privacy Act itself which authorizes the form of conditional access originally offered by the Navy.

In any event, the statutory caveat for medical records and the regulation issued by the Navy constitute a reasonable attempt to protect requesters of information from the potentially harmful effect of revelations from their own medical files. Even if the regulation in question could be said to impinge in some way on the privacy of plaintiff's communications with the staff of the United States Naval Hospital, such minute encroachment upon the doctor-patient

relationship does not constitute a violation of any judicially recognized right of privacy. Cf. Whalen v. Roe, 429 U.S. 589, 598-602 (1977).

CONCLUSION

Plaintiff has received the document that he requested from the Department of the Navy, and the Navy's original instruction that he designate a physician to receive it was neither improper nor the basis for any award of damages. Consequently the District Court properly dismissed plaintiff's Complaint, and it is respectfully urged that this Court affirm the order of the District Court.

Dated: New York, New York

September 23 , 1977

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
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-Of Counsel-

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

23rd day of September 19 77 s he served a copy of the within Brief of Defendants-Appellees

by placing the same in a properly postpaid franked envelope addressed:

Ira G. Jaffess
150 Bennett Avenue
New York, New York 10040

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

23rd day of September, 1977

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978